No. 98791-2

SUPREME COURT OF THE STATE OF WASHINGTON

JEFFREY and ANNA WOOD, husband and wife; MILIONIS CONSTRUCTION, INC., a Washington corporation; STEPHEN MILIONIS, an individual,

Petitioners,

v.

THE CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY,

Respondent

BRIEF OF AMICI CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Property Casualty Insurance Association (APCIA) is the preeminent national trade association representing property and casualty insurers writing business in Washington, nationwide, and globally. APCIA was recently formed through a merger of two longstanding trade associations—Property Casualty Insurers Association of America (PCI) and American Insurance Association (AIA). APCIA's members, which range in size from small companies to the largest insurers with global operations, represent nearly 60% of the United States property and casualty marketplace. On issues of importance to that marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels, and files amicus-curiae briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

The National Association of Mutual Insurance Companies ("NAMIC") is the largest property/casualty insurance trade group with a diverse membership of more than 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner's insurance market and 53 percent of the auto market. Through our advocacy programs we promote

public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

II. STATEMENT OF THE CASE

This appeal is from a reasonableness determination by the trial court of the settlement between plaintiffs, Jeffrey and Anna Wood (collectively "the Woods"), and defendants, Milionis Construction, Inc. and Stephen Milionis ("Milionis"). Milionis' defense was being paid by its commercial liability insurer, Cincinnati Specialty Underwriters Insurance Company ("Cincinnati Specialty"), under a reservation of Cincinnati Specialty's right to deny a duty to indemnify Milionis.

Defense counsel represented Milionis through three mediations and up to the eve of one arbitration. Naturally, this required Milionis' defense counsel to vigorously defend the case—to retain experts, take depositions, and analyze the Woods' damages and Milionis' liability. In fact, Milionis' defense counsel had researched, drafted, and filed dispositive motions on Milionis' lack of liability. But before these summary judgment motions could be decided, and to the exclusion of Milionis' defense counsel, the Woods and Milionis entered into a settlement and covenant judgment wherein Milionis accepted 100 percent liability for the Woods' damages in exchange for a covenant not to execute on a judgment against Milionis for $1.7 million. Milionis assigned its rights under the Cincinnati Specialty

policy to the Woods, who agreed they would only execute on the judgment against Cincinnati Specialty.

This case thus presents an example of a covenant judgment scheme that has become commonplace in Washington. While there are various iterations of these schemes, their common element is adversaries joining together to "set up" the insurer for a follow-on bad faith action.

Cincinnati Specialty filed a motion to intervene prior to the reasonableness hearing for the purpose of participating in that hearing, along with a motion to continue the reasonableness hearing to conduct discovery into the settling parties' negotiations. Notably, Cincinnati Specialty explained that it did not want to conduct discovery on the parties' claims, but instead on how the Woods and Milionis reached the final covenant judgment settlement agreement. The trial court permitted Cincinnati Specialty to intervene, but denied its motion to conduct the requested discovery and, after conducting a reasonableness hearing plainly focused on the Woods' damages, entered an order approving the settlement as reasonable.

Cincinnati Specialty appealed, arguing the trial court erred in not permitting it to conduct discovery prior to the reasonableness hearing and in finding that the settlement was reasonable on the evidence that was presented. The Court of Appeals reversed and remanded for a second reasonableness hearing, with instructions to the trial court to permit Cincinnati Specialty to conduct the requested discovery. *Wood v. Milionis Construction, Inc.*, 13 Wn. App. 2d 1043, ___ P.2d ___ (April 28, 2020).

This Court granted the Woods' petition for review. The Court's website states that the issue presented is whether sufficient evidence supports the trial court's determination that the settlement agreement was reasonable.

III. ARGUMENT

A. Covenant Judgments Have Always Carried the Risk of Collusion by the Settling Parties. This is the Reason That Trial Courts Are Compelled to Consider All Nine of the *Glover/Chausee* Factors, Including the Possibility of Collusion, in Determining Whether to Accept the Amount of the Proposed Covenant Judgment as Reasonable.

RCW 4.22.060 was enacted as part of the 1981 Tort Reform Act, Ch. 27, 1981 Wash. Laws 112 (Codified at Revised Code of Washington chs. 4.22 & 7.72 (1981)) ("The Act"). This statute provides authority for a trial court to conduct a hearing to determine the reasonableness of a settlement agreement among joint tortfeasors. *See* S. Anderson, Comment, *Contribution Among Tortfeasors in Washington: The 1981 Tort Reform Act*, 57 Wash. L. Rev. 479 (1982) ("Anderson"); *Glover v. Tacoma General Hosp.*, 98 Wn.2d 708, 711, 658 P.2d 1230 (1983). The burden is on the party requesting settlement to prove its reasonableness.

The Act did not provide any guidelines on what is an unreasonable settlement. The Senate Select Committee commented on this point as follows:

> The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Legislature. The reasonableness of the release will depend on

> various factors including the provable liability of the released parties and the liability limits of the released party's insurance.

Washington State Senate Select Comm. On Tort & Product Liability Reform, Final Report, 47th Leg. Reg. Sess. 54 (1981), *reprinted in* 1981 Wash.S.Jour. 636. "Denial of approval would be appropriate if proof of collusion between settling parties is present, or if the settlement amount is grossly disproportionate to the apparent value of the claim at the time of the settlement." Anderson, 57 Wash.L.Rev. at 500.

This Court in *Glover* identified nine factors the trial court should consider to determine reasonableness, including evidence of bad faith, collusion, or fraud:

> (1) the releasing party's damages; (2) the merits of the releasing party's liability theory; (3) the merits of the released party's defense theory; (4) the released party's relative fault; (5) the risks and expenses of continued litigation; (6) the released party's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released.

Glover, 98 Wn.2d at 717-718. No one factor controls. *Id*. Application of these nine factors focuses on weighing each of them based on the facts of the case at issue. *All* of the factors must be considered in making that determination. *Hamblin v. Castillo Garcia*, 9 Wn. App. 2d 78, 441 P.3d 1283 (2019) ("A court *must* consider the [*Glover*] factors to determine if a settlement is reasonable") (emphasis added)).

These nine factors were subsequently adopted to determine the reasonableness of consent judgments combined with covenants not to execute and the assignment of bad faith claims. *See Chausee v. Maryland*

Casualty Co., 60 Wn. App. 504, 510-511, 803 P.2d 1339 (1991); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002). The presumptive measure of the insured's damages in a bad faith action is the settlement amount, so long as the settlement amount is reasonable ***and not the product of collusion***. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 375, 89 P.3d 265 (2004); *see also Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 628, 245 P.2d 470 (1952). Determining that a covenant judgment is not the product of collusion is essential to protecting the legitimate interests of an insurer who is the "target" of such an agreement:

> Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important. A carrier is liable only for reasonable settlements that are paid in good faith. Application of the *Glover/Chausee* factors protects insurers from excessive judgments. Evaluating settlement through these criteria promotes reasonable settlements and discourages fraud and collusion.

Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC, 145 Wn. App 698, 704, 187 P.3d 306 (2008) (internal citations omitted).

It is critically important to note that the interests of all Washington policyholders, and not simply their insurers, require protection from the adverse marketplace impact (*e.g.*, with respect to premium calculations) of excessive judgments based on collusive or fraudulent settlements.

B. Permitting an Insurer to Conduct Discovery Into Each of the *Glover/Chausee* Factors is Essential to Assuring that a Covenant Judgment is Not the Product of Collusion. The Court of Appeals Here Correctly, Albeit Implicitly, Acknowledges This by Instructing the Trial Court, on Remand, to Permit Cincinnati Specialty to Conduct Discovery into Whether the Covenant Judgment was the Product of Collusion. This Court Should Recognize the Right of Insurers to Conduct Such Discovery, and Hold That a Denial of That Right Voids a Covenant Judgment and Requires a Remand for Further Proceedings.

It is *alway*s the case that a covenant judgment settlement carries with it the potential for collusion or fraud between the settling parties. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 766-777, 287 P.3d 551 (2012); *see also*, *Sykes v. Singh*, 5 Wn. App. 2d 721, 726, 428 P. 3d 1228 (2018) (Because of the possibility that an insured may settle for an inflated amount to escape exposure, Washington courts recognize the need for a mechanism to prevent collusion in settlements containing covenants not to execute.). This conclusion is compelled by the dynamics of the process that produces such agreements. By entering into a covenant judgment settlement, plaintiffs eliminate the need to continue litigating their claim and thereby avoid any potential factual findings on issues that could decrease their damages recovery if the matter went to trial (e.g., an adverse finding on contributory fault). The tortfeasor-insured, on the other hand, has no incentive to limit the settlement amount, and every incentive to agree to an unreasonably inflated judgment amount in order to achieve an agreement that cuts off further exposure, because of the covenant not to execute against the tortfeasor.

Settlements with covenant judgments have taken many forms. *See, e.g.*, *Hamblin v. Castillo Garcia*, 9 Wn. App.2d 78, 441 P.3d 1283 (2019) (settlement agreement underlying covenant judgment included a minimum percentage payment to the tortfeasor insured from any global settlement between the insurer and the tort victim.); *Miller v. Kenny*, 180 Wn. App 772, 325 P.3d 278 (2014) (as part of the settlement and covenant judgment, plaintiff agreed to share the proceeds of his bad faith action against the insurer with the insured/tortfeasor.) Every such agreement, however, regardless of its specific form, inherently presents the risk of collusion and fraud. The only way an insurer can protect itself—and also the integrity of the court process and the broader policyholder base—against the risk of collusion or fraud, is by discovery into the circumstances surrounding the entry into the agreement.

Accordingly, this Court should use this case as the opportunity to make clear to Washington practitioners and trial courts that insurers must be allowed to conduct such discovery. The only effective way to deter parties to the covenant judgment agreement from attempting to frustrate that right—ultimately by seeking trial court orders preventing the insurer from conducting such discovery (as happened here)—is to lay down a case law rule under which the denial of that discovery ***automatically voids the covenant judgment agreement at issue***. Appellate courts should remand for further proceedings, a part of which must be allowing the insurer to conduct the discovery it was denied in the first instance.

C. This Court Should Provide Guidelines Regarding the Nature and Scope of Discovery Allowed to an Insurer in Proceedings to Determine the Reasonableness of a Covenant Judgment.

In addition to a rule requiring trial courts to permit intervening insurers to conduct discovery into the circumstances surrounding the negotiation of the settlement and covenant judgement, Amici urge this Court to provide guidelines for trial courts concerning the scope of discovery permitted by an intervening insurer prior to the reasonableness hearing.

1. *Steel v. Philadelphia Indemnity Insurance Co.* Illustrates Generally the Nature and Scope of Discovery That an Intervenor Insurer Should be Permitted for the Purpose of Preparing to Participate in an RCW 4.22.060 Reasonableness Hearing.

In *Steel v. Philadelphia Indemnity Insurance Co.*, 195 Wn. App. 811, 381 P.3d 111 (2016), a liability insurer intervened in a negligence action for the purpose of participating in a reasonableness hearing and conducting discovery related to the reasonableness of a covenant judgment settlement which, like the one between the Woods and Milionis, assigned the insured's bad faith claim against its liability insurer to the plaintiff. The trial court permitted the insurer to intervene and ordered plaintiffs to produce:

- all records given to them by the insured's defense attorney;
- all discovery exchanged by the parties;
- all attorney work product related to the settlement; and
- all witness communications *and* expert communications.

Steel, 195 Wn. App. at 818-19 and 839. The insurer was also permitted to depose the insured and the insured's coverage *and* defense counsel and the adult plaintiffs. *Id*.

2. *Water's Edge Homeowners Ass'n v. Water's Edge Associates* Illustrates the Importance of Allowing Discovery Into the Communications and Other Evidence Bearing on the Circumstances Surrounding the Formation of a Covenant Judgment Agreement, Order to Protect Against Collusion.

In *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wn. App 572, 216 P.3d 1110 (2009), *rev. denied*, 168 Wn.2d 1019 (2010), the Court of Appeals focused on the collusion factor in evaluating reasonableness and upholding a trial court's determination that the proposed covenant judgment settlement was not reasonable because of collusion. The trial court concluded that collusion made the proposed settlement as a whole unreasonable—a determination upheld by the Court of Appeals.

In *Water's Edge*, the target insurer was permitted to conduct what was described as "limited discovery" related to the collusive nature of the settlement. The *Water's Edge* decision does not expressly identify the permitted discovery, other than to state "the trial court reviewed a considerable amount of testimony, documents, and briefing and heard argument from both the parties, and Farmers." *Id.* at 584. However, it is clear that the communications amongst counsel for the parties to the agreement were key to the trial court's decision finding the settlement

unreasonable because of collusion.[1] The communication between all counsel involved in *Water's Edge* illustrates the importance of an intervening insurer's right to look "behind the scenes" to see how the parties reached a covenant judgment settlement. The decision shows that it is not solely the amount of damages that determines whether a settlement is reasonable, and that discovery into the circumstances surrounding the entry into the agreement is critical to determining whether the agreement should be rejected on grounds of collusion.[2]

D. Intervening Insurers Should Have an Absolute Right to Discover Communications Surrounding the Negotiations of the Settlement and Covenant Judgment. Any Additional Materials to Which Any Question of Privilege is Raised Should be Resolved on a Case-by-Case Basis Under the Three-Part Test set Forth in *Pappas v. Holloway*.

Even though the language of each settlement agreement and covenant judgment may differ from case to case, ***all*** settlements with covenant judgments involve adversaries joining together to "set up" the

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[1] Discovery of emails and letters between all counsel involved (Dan Zimberhoff, Bob Hughes, Tom Heinrich, Bruce White, Rick Beal, Greg Harper, Steve Todd and Mark Scheer) was clearly essential to revealing that Zimberoff, Beal, Harper, and a partner of Zimberoff (Bo Barker) met for lunch to discuss and agree on a stipulated judgment and agreed that Beal would *then* testify that the ultimate stipulated judgment amount was reasonable.

[2] As will be discussed more fully in Section II.E of this brief, the trial court here failed to make a single written finding of fact addressing any of the *Glover/Chaussee* factors. Moreover, in issuing its oral ruling finding the settlement here to be reasonable, the trial court demonstrated its failure to apprehend that mere reasonableness of the agreed amount of the covenant judgment, standing alone, is not sufficient to rule a covenant judgment settlement reasonable, in the face of collusion concerns. *See* VRP 47 ("All of the discovery that you're requesting isn't really going to the reasonableness of the settlement. It's more of is there a collusion against Cincinnati? I haven't heard anything at all that says this is totally unreasonable."). This basic misapprehension of the law goes a long way towards explaining why the trial court—mistakenly—refused to allow discovery of the kind allowed in *Water's Edge*.

insurer for a follow-on bad faith action. Accordingly, and as previously explained, these schemes inherently carry with them the risk of collusion and fraud. Precisely because of this, those insurers against whom the covenant judgment will be used should always be entitled to discover the communications surrounding the settlement negotiations between the insured's lawyer and the plaintiff's lawyer, and to depose those parties about those communications. The insurer should not be required to demonstrate its need for these communications in a case-by-case basis, because that need is inherent in the very nature of a covenant judgment deal. *Water's Edge* shows exactly how important such evidence can be to determining whether the agreement at issue is fatally tainted by collusion.[3]

There is no legitimate basis for any claim of privilege related to these negotiations between adversaries in litigation. However, to the extent any of the additional requested discovery may be subject to privilege claims, Amici suggest that the framework for analysis of such potentially privileged information set forth in *Steel* should be adopted by this Court.

Washington follows a three-part test to determine whether a party has waived the attorney-client privilege. *Pappas v. Holloway*, 114 Wn.2d 198, 207, 787 P.2d 30 (1990) (based upon *Hearn v. Ray*, 68 F.R.D. 574 (E.D. Wash. 1975)):

[3] The insurer – and the trial court – would never have known about the nefarious luncheon conversation in *Water's Edge* if the insurer were not entitled to depose the counsel involved. This evidence, in turn, was critical to the trial court's conclusion that the settlement was unreasonable because of collusion.

(1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party;

(2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case.

(3) application of the privilege would deny the opposing party access to information vital to its defense.

This test is *not* limited to legal malpractice cases. *Steel v. Philadelphia Indemnity Ins. Co*., 195 Wn. App. 811, 823-24 (2016) *rev. denied*, 194 Wn.2d 1010 (2019); *see also Bellevue Farm Owners Assoc. v. Stevens*, 198 Wn. App. 464, 481, 394 P.3d 1018 (2017), rev. denied, 189 Wn.2d 1038 (2017).

The *Steel* court concluded that, in the circumstance of a covenant judgment and reasonableness hearing, the settling parties' request for a reasonableness hearing satisfies the first "affirmative act" factor of the *Pappas* test:

> Plaintiffs voluntarily entered into and sought to enforce the stipulated covenant judgment settlement agreements with the defendant insureds. Plaintiffs were required to initiate a reasonableness hearing if plaintiffs wanted to enforce the agreements against [the insurer]. As [the insurer] points out, plaintiffs had options other than settlement, including trial. Here, plaintiffs initiated the settlements and asked for the reasonableness hearing. ***Thus, plaintiffs request for the reasonableness hearing satisfied the affirmative act factor of the Hearn test.***

Steel, 195 Wn. App at 836 (2016)(emphasis added).

In evaluating the second factor of the *Pappas* test, concerning whether the affirmative act has made the protected information relevant to

the case, the *Steel* court advised that courts should consider whether the claim or defense asserted "depends on," "relies on," or makes the materials "integral to" resolution. *Steel*, 195 Wn. App. at 837 (internal citations omitted). The intervening insurer should show *why* and *how* the privileged communications are integral to a reasonableness determination under the *Glover/Chausee* factors.[4]

Amici suggest that the third *Pappas* factor, involving whether application of the privilege would deny the opposing party—in this context, the intervening insurer—access to information vital to its defense, is most critical. Without access to the otherwise privileged communications, an intervening insurer is likely stymied in its ability to contest the reasonableness of the settlement. "Protected communications are vital to a party's case when they contain information about a disputed issue that is not available from any non-privileged source." *Steel*, 195 Wn. App. at 839 (internal citations omitted).

In sum: Just as the target insurer in *Water's Edge* was permitted to do, an intervening insurer must be permitted to view the communications that led to the settlement and covenant judgment in order to analyze whether there was collusion in the formation of the covenant judgment settlement.

[4] The insurer in *Steel* was not able to make this showing. As previously set forth, the intervening insurer in Steel was permitted wide-ranging discovery, and was not able to explain why the attorney-client protected communications were integral to the *Glover/Chausee* factors, "when in addition to the other significant discovery that they already conducted, they ha[d] all communications between plaintiffs and the former defendant insureds, they have deposed two of the insured's attorneys, and they have documentation [showing a relevant confession by the insured's former employee.]" *Steel*, at 837-838. Here, the trial court never reached this "second-level" issue because the court—erroneously—denied any discovery into the circumstances surrounding the formation of the agreement.

Whether the insurer should be permitted to go farther should depend upon the application of the three-factor *Pappas* test. And it should be underscored by this Court that the insurer should be permitted discovery into any non-privileged matters bearing on any of the *Glover/Chausee* factors.

E. The Trial Court's Findings of Fact Do Not Offer a Valid Basis for Reinstating the Trial Court's Decision Based on the Rule of "Verities on Appeal." *None* of the Trial Court's Findings Address the *Glover/Chausee* Factors, and Nothing the Trial Court Said About Those Factors in the Court's Oral Ruling Is a Proper Basis for Applying the "Verities on Appeal" Rule.

As stated earlier in this brief, this Court's website has described the issue before this Court as whether the trial court's findings are supported by substantial evidence. Judge Fearing in his dissent and the Petitioners in their briefing to this Court (both during the petition and supplemental briefing phase) have placed great emphasis on the supposed dispositive nature of the trial court's findings of fact, which Judge Fearing and Petitioners have emphasized are "verities on appeal" because no error was assigned to them by Cincinnati Specialty.

While it is correct that Cincinnati Specialty did not assign error to any of the trial court's findings, that appellate procedural fact is of no moment to the resolution of the issues before this Court. The trial court ***made no findings on any of the Glover/Chaussee factors*** in its findings of fact. The trial court did comment on those factors in its oral ruling. But an

appellant has no obligation to assign error to findings made only in an oral ruling, and the "verities on appeal" rule therefore has no application.[5]

And even if the "verities…" rule did apply, it would make no difference and could not save the trial court's judgment. The trial court's cardinal error was its assumption that collusion was irrelevant to whether the covenant judgment amount was reasonable. VRP (7/13/2018 & 7/20/2018) 47. The fact of collusion goes to the fundamental fairness of the process that results in a covenant judgment agreement, which necessarily affects whether a trial court should endorse the proposed covenant judgment amount. If there is collusion, it is essential that a trial court reject the proposed covenant judgment. Nothing less can protect the integrity of the process.

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[5] Indeed, under this Court's precedents, an appellant is not supposed to assign error to a trial court's oral decision. *See El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 857, 376 P.2d 528 (1962) ("We have held that parts of the oral decision cannot be assigned as error because the court's final determination is expressed in its findings, conclusion and judgment. The court's oral decision is subject to change by the trial judge at any time prior to the entry of judgment." (citing *Rutter v. Rutter*, 159 Wash. 796, 370 P.2d 862 (1962); *Eyre & Company v. Hirsch*, 36 Wn.2d 439, 218 P.2d 888 (1950)). Logically, and as Division Two expressly recognized in an opinion authored by this Court's future Chief Justice Gerry Alexander, this rule means that oral findings of fact to which no error is assigned do not become verities. *See State v. Hales*, 44 Wn. App. 749, 751-52, 723 P.2d 490 (1986) ("Hales argues that because the State did not assign error to the trial court's oral findings, those findings must be treated as verities on appeal. Hales overlooks the fact that although the oral decision of the trial court may be used to interpret consistent written findings, a party may not assign error to the oral findings of the trial court. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 857, 376 P.2d 528 (1962). *Therefore, this court need not treat the trial court's oral findings as verities on appeal*." (emphasis added)) (op. per Alexander, J., joined by Petrich and Worswick, JJ.). The Amici acknowledge that Division Three, in *State v. Shaver*, 116 Wn. App. 375, 65 P.3d 688 (1994), stated that oral findings to which no error has been assigned do become verities on appeal, but the court in that case did not address either this Court's many decisions holding that error may *not* be assigned to an oral decision, or Division Two's decision in *State v. Hales* recognizing that rule and therefore concluding that oral findings to which no error has been assigned do not become verities on appeal.

For that reason, the trial court's error here in refusing to allow discovery into the circumstances surrounding the formation of the agreement at issue inherently and fatally taints its ultimate reasonableness determination. Even if the trial court had entered a *written* finding of no collusion, that finding would be *legally* untenable ***because the trial court denied discovery into the circumstances surrounding the formation of the agreement***. And because of the *inherent* possibility of collusion built into these agreements, a denial of this discovery should (as previously stated) require a reviewing court to void the agreement and remand for further proceedings, which must include the opportunity for the insurer to conduct the discovery that should have been allowed in the first place.

IV. CONCLUSION

This Court should affirm the Court of Appeals decision. In doing so, this Court should confirm the right of Cincinnati to conduct discovery into the circumstances surrounding the formation of the covenant judgment agreement at issue in this case.

Respectfully submitted this 14th day of January, 2021.

CARNEY BADLEY SPELLMAN, P.S.

By _____

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and e-file, to the following:

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DATED this 14th day of January, 2021.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

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